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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 156

THE UNITED STATES, PETITIONER

v.

COMMODITIES TRADING CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on April 4, 1949.

OPINION BELOW

The opinion of the Court of Claims (R. 23-30 [1]) is reported at 83 F. Supp. 356.

JURISDICTION

The judgment of the Court of Claims was entered on April 4, 1949 (R. 30-31). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

[1] The record certified to this Court by the Court of Claims includes a substantial amount of evidence, most of which respondents designated for certification and which, by stipulation of the parties, has been omitted from the printed record accompanying the Government's petition for a writ of certiorari. (R. —) and (Tr. —) will be used herein to refer to the printed record and the unprinted transcript, respectively.

QUESTION PRESENTED

Whether in a suit for just compensation by the owner of whole black pepper, requisitioned by the United States for war uses, the proper measure of just compensation was the lawful O. P. A. ceiling price which when established approximated free market value and thereafter formed the basis for substantial trading, or a so-called retention value which took into account, among other items, scarcity value caused by wartime shortages and a speculative value based upon the expectation of an ultimate removal of wartime price restrictions.

STATUTE INVOLVED

The pertinent portions of the Requisitioning Act as it read at the time of the requisition in question (Act of October 16, 1941, c. 445, 55 Stat. 742, as amended by the Act of March 27, 1942, c. 199, 56 Stat. 181, and the Act of June 30, 1943, c. 181, 57 Stat. 271) [2] provided as follows:

> Whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1944, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equip-

[2] The statute was thereafter amended, in respects of no significance to this case, by the Act of June 28, 1944, c. 307, 58 Stat. 624 and the Act of June 30, 1945, c. 208, 59 Stat. 271. See 50 U.S.C. App., 1940 ed. Supp. V, 721. The Act has expired by its own terms. See note under "Codification", 50 U. S. C. App., 721 (1946 ed.).

ment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act * * * but each such determination shall be made as of the time it is requisitioned * * * in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24 (20) and 145 of the Judicial Code (U.S.C., 1934 ed., title 28, secs. 41 (20) and 250) for an

additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. * * *

STATEMENT

Respondent, Commodities Trading Corporation (Commodities), has brought this suit to recover just compensation for the requisition by the War Department, in May 1944, of some 760,000 pounds of whole black pepper. The pertinent facts are these:

Whole black pepper is grown in Sumatra, French Indo-China and India, the Lampong type here involved being grown only in Sumatra (R. 15). It is not perishable and will last unimpaired in quality for several decades (R. 22). In March, 1942, when this country was cut off from these producing areas (except India) by Japanese military successes in the Pacific, there were about 78,000,000 to 100,000,000 pounds (about three years supply) of whole black pepper in the hands of importers in the United States (R. 15). Of this stock pile, approximately 17,000,000 was owned by Commodities and had been accumulated by it since its incorporation in 1933 (R. 14, 15). On December 7, 1941, Commodities had had approximately 21,000,000 pounds, but 4,000,000 pounds had been sold for future delivery and was delivered in the early months of 1942 (R. 14).

During the years 1936 to 1940, both inclusive, the average annual price of whole black pepper, computed from daily spot prices, had been: 1936,

5.5 cents per pound; 1937, 6.1 cents; 1938, 5.4 cents; 1939, 4.0 cents; 1940, 4.1 cents (R. 15). During the year 1941, through the month of November, the average daily prices had been: January, 4.1 cents per pound; February, 4.5 cents; March, 6.2 cents; April, 6.3 cents; May, 6.9 cents; June, 5.8 cents; July, 5.9 cents; August, 6.1 cents; September, 6.0 cents; October, 5.8 cents; November, 5.8 cents (R. 15). During the first week of December 1941, the average daily price was 5.78 cents per pound (R. 15). The average price over the 50-year period preceding the war was 13½ cents a pound (R. 16).

On December 11, 1941, the Office of Price Administration issued Price Schedule No. 52, establishing a ceiling price of 6.75 cents a pound on the whole black pepper ex dock or warehouse, New York City (R. 15).[3] This price, the court below has found, was at least the fair market price as of that date (R. 16). On February 3, 1942, the Office of Price Administration amended and reissued this

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[3] The preamble reads as follows (6 Fed. Reg. 6375):

> Pepper is one of the imported commodities which has experienced during the past few months several sharp inflationary price movements. This was followed by a period of relative price stability. With the outbreak of war, the dangers of speculation and inflationary price rises have been magnified, mainly because of the fear of shipping shortages and eventual depletion of stocks. To prevent such unwarranted movements and to hold the stability achieved by the trade, the Office of Price Administration hereby freezes all pepper prices at those which prevailed at New York City on December 8, 1941.
>
> It is contemplated that, after completion of the studies now being made, a revised price schedule will be issued. If the studies so justify, prices lower than the maximum prices herein will be ordered.

price schedule as Revised Price Schedule No. 52, setting the ceiling price at 6.50 cents per pound (R. 17). To this were added labor charges paid the warehouse for putting the pepper in storage and taking it out, and warehouse storage charges for not more than 30 days, which, on the average, raised the ceiling price for pepper which had been stored in warehouses for 30 days or more to about 6.63 cents a pound (R. 17).[4]

Between December 11, 1941 and February 3, 1942, actual prices did not reach the 6.75 cents price ceiling (R. 16). During January, 1942, the highest daily price was 6.45 cents a pound, with the average for the month being 6.41 cents (R. 16). These sales were made by certain traders, importers and grinders, particularly those who held smaller lots, because they realized that it would be impossible for them to obtain a greater price than the ceiling and they therefore sold rather than hold the pepper indefinitely and incur the cost of holding (R. 16).

Despite the progressively stricter restrictions in 1942 and 1943, imposed for conservation purposes by the War Production Board and later by the Director of Food Distribution, on the deliveries of peppers by packers and receipts by wholesalers and industrial users (R. 17-18), the traders and importers rapidly disposed of their stocks to wholesalers and grinders (R. 18). There was progres-

[4] The Revised Price Schedule No. 52 also provided that the maximum price for pepper sold for export might exceed the domestic price by no more than ten per cent (R. 17).

sively less activity from approximately the middle of 1942 as importers, other than Commodities, disposed of their holdings and replenishment of their stocks had become impractical because of war conditions (R. 18). By September 30, 1943, the inventory in the hands of importers had been reduced to about 28,000,000 pounds, of which Commodities continued to retain its original 17,000,000 pounds holding (R. 18; *supra*, p. 4). Between September 30, 1943 and the date of requisition (May 26, 1944), very little whole black pepper was sold out of these inventories (R. 18), and Commodities itself apparently refused to sell any substantial amounts either to the Government or to private purchasers.

On October 4, 1943, Commodities, in the first formal protest against ceiling prices for pepper (R. 19, Tr. 2), filed a petition seeking amendment of Revised Price Schedule No. 52 and requesting the addition of a provision allowing persons who sold pepper ex warehouse to add storage charges computed at the rate of 1/24 cent per pound per month "for the average number of months beyond one month during which the pepper held by the seller at the date of this amendment shall have been owned and stored by him" (R. 20). The Price Administrator by a letter dated March 11, 1944 denied the petition (R. 20; D. Ex. 3). In the letter, it was pointed out that an evaluation of Commodities' inventory on a "first in, first out" basis showed that the average cost of its inventories on February 3, 1942 was 5.156 cents per pound, and

sales of its inventory at that time, at the ceiling price of 6.50 cents plus permissible charges, or 6.63 cents, would have afforded it a gross margin of profit of 20.35 per cent (D. Ex. 3, p. 2).[5] Since "the trade reports that a reasonable profit is 10 per cent, the ceiling price established on February 3, 1942, appears as fair and equitable to you" (D. Ex. 3, p. 2). The letter further noted (D. Ex. 3, p. 2):

> Of course, you held your pepper following the original issuance of the regulation fully recognizing the fact that the regulation did not provide for further carrying charges. Grinders have been ready to purchase since the issuance of the regulations. Under all these circumstances, it has been determined that it would be unfair to give you the increase in maximum prices which you request.

Commodities did not appeal from this denial to the Emergency Court of Appeals (Tr. 3).

On May 29, 1944, the War Department, acting pursuant to the Act of October 16, 1941, as amended, *supra*, pp. 2-4, requisitioned and took possession of 759,750.88 pounds of Lampong whole black pepper, owned by Commodities, subject to the lien of Irving Trust Company (R. 13).[6] Both

[5] Had the inventory been sold on October 4, 1943, the date of Commodities' petition, the Administrator commented, the additional carrying charge of .6232 cents per pound would have reduced the gross margin of profit by 8.13 per cent (D. Ex. 3, p. 2).

[6] The War Department had previously requisitioned approximately one million pounds of pepper from Commodities.

Commodities and Irving Trust Company rejected the offer of the War Department's "initial compensation officer," the determination of the Chief Requisitioning Officer, Offi.. of Quartermaster General, and the award of the Acting Under Secretary of War of $50,266.76 plus interest at 4% as just compensation for this pepper (R. 14-15). This amount was computed on the basis of the 6.63 cents per pound ceiling price in effect on the date of the requisition (R. 14-15). Fifty per cent of the award was thereafter paid to them (R. 15), and on October 3, 1945, this suit for just compensation was filed in the Court of Claims[7] (R. 1-4). In its special findings of fact, the Court of Claims, in addition to the foregoing, made the following findings of fact:

On November 1, 1943, in response to the request of the War Department, Commodities had offered to sell to it one million pounds of pepper at 9¾ cents per pound, subject to obtaining prior approval of the Office of Price Administration (R. 20). No formal action had been taken on Commodities' application for such approval since, while the matter was pending, the pepper was requisitioned by the War Department (R. 20). This requisition is now subject to litigation in the Court of Claims. *Commodities Trading Corporation* v. *United States*, C. Cls. No. 47588. The subsequent requisitions from Commodities of whole black pepper, one by the War Department of about 500,000 pounds in April 1945 and the other by the Navy Department of about 300,000 pounds in June 1944, are also subject to litigation in the Court of Claims. *Commodities Trading Corporation* v. *United States*, C. Cls. No. 47587.

[7] Approximately three months after the institution of this action, Commodities was dissolved by the voluntary action of its stockholders (R. 8, 12). Pursuant to the plan of dissolution, the company's assets, including its claim in this proceeding, were distributed in kind to the stockholders, in proportion to their holdings (R. 8, 12). The stockholders, upon being permitted to intervene in the Court of Claims as parties plaintiffs in this proceeding, have adopted the petition therein filed and the proceedings had (R. 9, 13).

The pepper requisitioned by the Government is identified by lot numbers from purchases by Commodities from October 1933 to January 1936, amounting to 5805 bags, or 773,201 pounds net, at an invoice cost of $53,143.13, an average of 6.21046 cents per pound (R. 21). By the time it was requisitioned, it had been carried by Commodities for periods averaging 9 years and 4½ months, and its total cost to Commodities including carrying charges, allowance for shrinkage and for general administrative expense, but excluding officer's salaries, supervision and purchasing expenses, resulted in an average cost to Commodities of 12.7 cents per pound (R. 21-22). This cost included substantial charges for storage, insurance, taxes, and financing incurred during the period after establishment of the ceiling price during which respondent refused to make sales (R. 22); the average cost as of February 1942 was much lower. *Supra*, pp. 7-8.

In October 1944, the Office of Price Administration, after obtaining an informal agreement from Commodities to sell about 7,000,000 pounds at a higher price, increased the ceiling price to 10 cents per pound (R. 19). Commodities did sell approximately 7,000,000 pounds at that price (R. 19). In June 1945, Commodities sold approximately 124,000 pounds of pepper to consignees in Puerto Rico at various prices averaging 14.19 cents per pound (R. 19); the then Price Schedule permitted an exportee to add to the 10 cents domestic ceiling, his usual pre-war export mark-up plus 25% thereof

(R. 19). In March 1946, again following negotiations between Commodities and the Government, the ceiling price was increased to 16 cents per pound and thereafter Commodities sold its remaining inventory of about 3,000,000 pounds at that price (R. 19). After the removal of price ceilings in August 1946, pepper was actively sold at 50 to 60 cents per pound and upward, and at 40 cents a pound and upward for future delivery in 3 or 4 months (R. 18).

Because of the nature of the pepper vine and the conditions under which it is grown in Sumatra, there is about a 5-year time lag before prices can affect the crop (R. 22). The reduction in crops in 1937, 1938, 1939 had had, by 1941, sufficient effect in raising prices so that new plantings might have been made by 1942 (R. 22). "If there had been no war in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946 when the new plantings would have begun to bear. This decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States." (R. 22-23).

In determining just compensation, the Court of Claims refused to be governed by the concurring opinion of Mr. Justice Reed in *United States v. Felin & Co.*, 334 U. S. 624, 642, and rejected the applicable maximum price as the measure of just compensation since the property requisitioned was non-perishable (R. 24-25). "This is so because the owner of nonperishable property

has the right to hold it until after restrictions are removed and then to sell it" (R. 25). It held that because of the owner's right to retain the property, just compensation must be fixed on the basis of "retention value," which it considered particularly applicable here, since Commodities, being an "investor" rather than a trader in pepper, "had accumulated its stock in the expectation that there would be a considerable rise in the price of pepper, at which time it expected to dispose of it" (R. 25). In arriving at retention value, the court considered the "very great rise in price [which] was inevitable upon the removal of restrictions" (R. 26), and the rise in price, which but for the war, would probably have resulted due to curtailment of planting. (R. 26). It further considered the cost of the pepper to Commodities and the sales subsequent to the requisition at the increased ceiling prices and concluded that the fair value of the pepper on May 26, 1944, the date on which it was requisitioned, was $113,962.63, or 15 cents a pound (R. 27). Judge Madden dissented on the ground that the ceiling price was the proper measure of just compensation (R. 28-30). Chief Judge Jones did not participate (R. 30).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

(1) In failing to hold that the maximum price in effect at the time the pepper was requisitioned,

validly established by the Office of Price Administration, was the proper standard of just compensation therefor.

(2) In holding that the determination of just compensation in time of war or national emergency must take into account "the plaintiff's right to hold its property until restrictions on its disposition are removed" and "his right to hold his property until he can get for it whatever any one is willing to pay."

(3) In fixing as just compensation for the pepper requisitioned an amount in excess of the maximum price therefor at the time of the requisition, as fixed by the regulations of the Office of Price Administration.

(4) In entering judgment for respondents in the amount for which it was entered.

REASONS FOR GRANTING THE WRIT

In this case, the War Department requisitioned a part of Commodities' stock pile of whole black pepper, an imported commodity, which had become very scarce because the Japanese had overrun the principal sources of supply. During this period of increasing shortage (1942-1944), Commodities, which had been created in 1933 to speculate in pepper, refused to sell while other importers disposed of their stocks. As a result, at the time of requisition it owned more than 60% of the total domestic stock pile, and the Army was forced, in

order to procure the necessary supplies, to invoke its powers of condemnation. The Government offered to pay Commodities as just compensation the maximum price established by the Office of Price Administration. This price, when established early in 1942, reflected the fair market price and was the price at which 80 to 90% of the domestic pepper, other than that owned by Commodities, was thereafter bought and sold.

The refusal of the court below to limit Commodities' recovery to this ceiling price squarely presents the question whether a maximum price, validly established in time of war, and forming the basis for substantial trading, may be taken as the measure of just compensation for property requisitioned by the Government to meet its wartime needs. In *United States* v. *Felin & Co.*, 334 U. S. 624, three justices (joined in part by Mr. Justice Rutledge) concurring in the Court's judgment were of the opinion that the maximum price there involved measured just compensation. 334 U. S. at 642. Three other justices, with whom Mr. Justice Rutledge also joined in part, while they recognized that "the implications * * * reach far" (334 U. S. at 625), considered it unnecessary to pass on that question (334 U. S. at 630). Despite the termination of the wartime procurement program, this problem has importance, both present and potential. Similar questions are involved in a substantial number of actions pending against the United States for property requisitioned for war-

time uses. In addition, determination of the impact in wartime of valid maximum prices on just compensation will have an important bearing on the methods of mobilizing civilian property for the defense of the country which may be adopted in the event of future national emergencies. Cf. *Lichter* v. *United States*, 334 U. S. 742, 766-768.

1. (a) The Court of Claims erred in rejecting, as unfair to respondent, an award based on the established lawful O.P.A. maximum price for the pepper involved here. In the circumstances of this case, payment measured by that ceiling price was just and equitable to respondent and the Government, as well as to the public, and the Fifth Amendment prescribes no more exacting or precise test of compensation. *United States* v. *Felin & Co.*, 334 U. S. 624, 642 (opinion of Mr. Justice Reed); see, also, *Vogelstein and Co.* v. *United States*, 262 U. S. 337; *Cudahy Bros. Co.* v. *United States*, 155 F. 2d 905 (C. A. 7); *United States* v. *Delano Park Homes*, 146 F. 2d 473 (C. A. 2); *Graves* v. *United States*, 62 F. Supp. 231 (W. D. N. Y.); *Lessner Plumbing and Heating Co.* v. *United States*, 64 F. Supp. 931 (S. D. N. Y.); *Louisville Flying Service, Inc.* v. *United States*, 64 F. Supp. 938 (W. D. Ky.). Although, as the court below pointed out (R. 25), the property involved in the *Felin* case was perishable, the rationale of that opinion applies equally where, as here, the property involved is not perishable. In either situation, it would be anomalous to hold that, while the Government may in the exercise of the war

powers, impose maximum prices at which property is sold to the general public, it must pay a higher price as just compensation when it exercises these war powers to requisition property for use in the defense of the nation from aggression. See R. 30 (Judge Madden dissenting); cf. *United States* v. *Felin & Co.*, 334 U. S. 624, 645; *Lichter* v. *United States*, 334 U. S. 742, 755-766; *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 305. Such a distinction would not only place a premium on non-cooperation with the Government's war procurement program (cf. *United States* v. *Delano Park Homes*, 146 F. 2d 473, 474 (C. A. 2)), but would in large measure nullify the anti-inflation objectives of the price control legislation.* During

* Section 1(a) of the Emergency Price Control Act of 1942 (56 Stat. 23, as amended, 50 U. S. C. App. 901) provides that the objectives of the Act were

> "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; *to assure that defense appropriations are not dissipated by excessive prices;* to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; *to prevent hardships* to persons engaged in business, to schools, universities, and other institutions, and *to the Federal, State, and local governments, which would result from abnormal increases in prices;* to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. * * *" (Italics supplied.)

a period of war, Government buying dominates the market, and hence the legally established maximum prices would cease to have much meaning if the Government were put in the position of procuring needed property by requisition, rather than by voluntary cooperation, and were required to pay more than these maximum prices. Those fortunately possessed, like respondent, of a large share of a required commodity would be impelled by their own pecuniary interests to avoid and destroy the ceiling price-structure by insisting on condemnation. See Note, *Legal and Economic Aspects of Wartime Price Control*, 51 Yale L. J. 819, 840-841; Marcus, *The Taking and the Destruction of Property Under a Defense and War Program*, 27 Cornell L. Q. 476, 528-530.

(b) The use of these legally established prices as the measure of just compensation in a period of war is fully warranted, even though the market during that period is not completely free and open, but is controlled as to upward movement of selling price. Although so controlled, these prices fully meet the standards of fairness and substantial justice to the owner which this Court has frequently held are the only basic measures of the compensation prescribed by the Constitution. *United States* v. *Cors*, 337 U. S. 325, 332; *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377-378; *United States, ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 279, 280; *United States* v. *Miller*, 317 U. S. 369, 375. Just as the value on an uncontrolled market

is not always synonymous with just compensation, but rather is used only when it reflects a *fair* market value, which the owner should receive, so too do properly established ceiling prices reflect a fair market value, at least where active and substantial trading has taken place thereunder. Note, 60 Harv. L. Rev. 132, 136. Under the Emergency Price Control Act (56 Stat. 23, as amended, 50 U. S. C. App. 901 *et seq.*) the prices set by the Price Administrator were to be those which, "in his judgment will be generally fair and equitable" Section 2(a), 50 U. S. C. App. 902(a).[9] They were to be set with "due consideration" to the prices in a normal market, *i. e.*, "the prices prevailing between October 1 and October 15, 1941 (or if * * * the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative)."[10] Moreover, provision was usu-

[9] No question as to a legislative determination of just compensation need be here involved; Section 204(a) (50 U. S. C. App. 924(a)) provides for judicial review by the Emergency Court of Appeals of the price ceilings so established. Cf. *United States* v. *Jones*, 336 U. S. 641.

[10] Section 2(a) goes on to require the Administrator to "make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941."

ally made for special relief to individual vendors who could show that a general price regulation had an unfair incidence in their particular case. Thus, the maximum prices established by the Office of Price Administration, and not overthrown by the Emergency Court of Appeals, must normally be taken to be fair and equitable, with a free market price used whenever representative. In these circumstances, their use during wartime as the measure of just compensation—which itself requires no more than fairness, equity, and substantial justice—will necessarily bear the stamp of fairness (except in the unusual instance) to the owner, to other traders, the public and the Government. Cf. *Walker* v. *United States*, 105 C. Cls. 553, 580; Note, 60 Harv. L. Rev. 132, 133-134. Denial of any excess over the fair and equitable ceiling price can therefore constitute no injustice to the owner of the requisitioned goods. Cf. *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 280; *Nortz* v. *United States*, 294 U. S. 317, 329-330; see, also, *e. g. Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591.

(c) The course of events in this case demonstrates the propriety of using the established maximum price for whole black pepper as the full measure of respondent's compensation. The cessation in active trading in the commodity by May 26, 1944, when the pepper was requisitioned, resulted both from a scarcity of pepper and the concentration of the available supply in the hands of

few persons, principally Commodities, which, as a speculator owning more than 60 per cent of the total stock pile, was holding it for the high prices it was expected to command upon the termination of controls. In contrast to this anticipated speculative profit, predicated on the scarcity of pepper, which, we submit, was not a proper element of just compensation (cf. *United States* v. *Cors, supra,* at 341, fn. 3 (Mr. Justice Frankfurter dissenting)), it is clear that the O. P. A. ceiling price approximated a fair market price for whole black pepper (cf. R. 16). The average annual price during the approximately six years prior to the imposition of any price ceiling was well below the ceiling (see R. 15, *supra,* pp. 4-5). Active trading continued at or below maximum price after its establishment while the stock pile, which, at the outbreak of hostilities amounted to between 78 and 100 million pounds, was still widely held. Many millions of pounds of pepper were sold by private owners to private buyers at this price. Active trading diminished and finally ceased only after importers, other than Commodities, disposed of their holdings, and replenishment of their stock had become impractical because of war conditions (R. 18).

In addition, the maximum price was not protested as unfair, either when it was first established or thereafter on the basis of changed circumstances.[11] In its petition filed with the Price Ad-

[11] It is nowhere suggested that the ceiling price was set with a view to establishing the price for Government requisitioning, rather than to the needs of private trading. Cf. 334 U. S. at 646; R. 29.

ministrator on October 4, 1943, almost two years after the establishment of this ceiling price, Commodities sought only permission to include additional storage costs in the price (R. 20); the Price Administrator denied the request because he found that the price allowed Commodities a profit substantially in excess of the normal profit in the trade, and he also specifically determined that the general price ceiling should, in all fairness, be applied to respondent. *Supra*, pp. 7-8. Commodities did not appeal to the Emergency Court of Appeals from this denial. *Supra*, p. 8. Cf. *United States* v. *Felin & Co.*, 334 U. S. 624, 646. Clearly, therefore, the O. P. A. maximum price stands uncontested as both generally fair and equitable, and also fair and equitable in its individual application to respondent—properly the entire measure of just compensation to which Commodities is entitled (cf. R. 29-30, Judge Madden dissenting).

2. The court below compounded its error by determining just compensation on the basis of "retention value," which it stated involved "taking into consideration [the owner's] right to hold his property until he can get for it whatever anyone is willing to pay" (R. 25), "the price it undoubtedly could have secured for its pepper had it been permitted to hold it until after restrictions had been removed" (R. 27), as well as transactions which occurred after the requisition (R. 27). A determination of just compensation on the basis of these considerations violates the fundamental principle

that just compensation is to be determined at the time of taking (*Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306; *Vogelstein & Co.* v. *United States*, 262 U. S. 337; *United States* v. *New River Collieries Co.*, 262 U. S. 341; *Olson* v. *United States*, 292 U. S. 246), and partially nullifies the dominant purpose of the requisitioning power to enable the Government to obtain needed goods, at reasonable prices, from a recalcitrant owner who would prefer to await the much higher sums which he anticipates, because of wartime conditions, private parties will be willing to pay in the future. Cf. I Bonbright, *The Valuation of Property* (1937) 408; cf. *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 309. For wartime takings, the Fifth Amendment's just compensation clause does not require the owner to be compensated for expected post-war profits.

Moreover, the decision below erroneously compensates Commodities for the pepper's special value to it for speculative purposes due to its scarcity (*United States* v. *Cors*, *supra*, at 341, fn. 3 (Mr. Justice Frankfurter dissenting); *Olson* v. *United States*, 292 U. S. 246, 257; cf. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377), and for its economic power as a monopolist of whole black pepper. The subsequent sales—some taking place after October 1945, when this suit was brought (*supra*, p. 9)—which the court below took into consideration were made at the increased O. P. A. ceiling prices which Commodi-

ties had exacted as a condition for its making available to the public a part of its stock pile.[12] Such value does not represent "what 'a willing buyer would pay in cash to a willing seller,' *United States v. Miller* [317 U. S. 369], 374, in a fair market" (*United States* v. *Cors, supra*, 337 U. S. at 333), but represents what can be exacted from the public for a commodity, the supply of which, because we were cut off from foreign sources, had become increasingly scarce. As stated in the *Cors* case (337 U. S. at 334), that is "a hold-up value, not a fair market value" and, hence, far from being the proper measure of just compensation as the court below held, should not have even been considered as an element in its determination.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

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JULY 1949.

[12] The court below failed to accord any weight to Commodities' offer of November 1943 to sell to the War Department a million pounds of pepper at 9½ cents a pound (R. 20; *supra*, fn. 6, p. 9.)

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